U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: FEB 21 2013 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Texas Service Center. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a non-profit school. It seeks to employ the beneficiary permanently in the United States as a "Coordinator of Chinese Language and Cultural Program," pursuant to section 203(b)(2) of the Immigration and Nationality Act (Act), 8 U.S.C. §1153(b)(2).[1] As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established its continuing ability to pay the proffered wage to the beneficiary since the priority date. The director denied the petition accordingly. The petitioner filed a timely appeal.

On appeal, counsel contended that the director erred by failing to consider the totality of the circumstances in determining that the petitioner has the continuing ability to pay the proffered wage to the beneficiary since the priority date. Counsel asserted that the petitioner has provided sufficient evidence to establish that it possesses the continuing ability to pay the proffered wage to the beneficiary since the priority date. Counsel submitted documentation in support of the appeal.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In the instant case, the ETA Form 9089 was accepted on July 21, 2009. The proffered wage as stated on the ETA Form 9089 is $78,380.00 annually. The ETA From 9089 states that the position requires a U.S. master's degree in "Chinese, Foreign Language Education, or TESOL" or an equivalent foreign degree, no training, and no experience in the offered job. At part K of the ETA Form 9089, which was signed by the beneficiary on April 15, 2011, the beneficiary claimed to be employed by the petitioner as a Chinese language teacher from September 1, 2008 to July 21, 2009.

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[1] Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(2).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA From 9089 establishes a priority date for any immigrant petition later based on the ETA From 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2).

The AAO issued a Request for Evidence (RFE) to counsel and the petitioner on November 26, 2012, acknowledging that the petitioner submitted copies of its Form 990, Return of Organization Exempt from Income Tax, for 2009. The AAO noted that although the beneficiary claimed to be previously employed by the petitioner as a Chinese language teacher from September 1, 2008 to July 21, 2009 at part K of the ETA Form 9089, the record contains Forms W-2, Wage and Tax Statement, reflecting wages paid by the petitioner to the beneficiary in 2009 and 2010. Therefore, the AAO requested that the petitioner provide copies of its complete federal tax returns or audited financial statements for 2010 and 2011, as well as any Form W-2 statements or Form 1099-MISC, Miscellaneous Income, issued to the beneficiary by the petitioner in 2011.

The AAO noted in the if a petitioner has filed multiple petitions for multiple beneficiaries, the petitioner must establish that it has the ability to pay the proffered wages to each beneficiary. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

A review of electronic databases available to United States Citizenship and Immigration Services (USCIS) revealed that that the petitioner had filed at least one other immigrant petition with USCIS. Accordingly, the AAO requested that the petitioner provide the following information for each beneficiary for whom it had filed a Form I-140:

- Full name.
- Receipt number and priority date of each petition.
- Exact dates employed by your organization.
- Whether the petition(s) are pending or inactive (meaning that the petition has been withdrawn, the petition has been denied but is not on appeal, or the beneficiary has obtained lawful permanent residence). If a petition is inactive, provide the date that the petition was withdrawn, denied, or that the beneficiary obtained lawful permanent residence.
- The proffered wage listed on the labor certification submitted with each petition.
- The wage paid to each beneficiary from the priority date of the instant petition to the present.
- Form W-2 or Form 1099-MISC statements issued to each beneficiary from the priority date of the instant petition to the present.

The petitioner and counsel were given 45 days to respond to the RFE The AAO specifically alerted the petitioner and counsel that failure to respond to the RFE would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit

requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

More than 45 days have passed since the RFE was issued, and the AAO has received no response from either the petitioner or counsel. Therefore, the appeal will be dismissed. *See* 8 C.F.R. § 103.2(b)(13).

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.